LADD PETROLEUM CORP.
PATRICK PETROLEUM CORP. OF MICHIGAN

IBLA 87-218 Decided January 24, 1989

Appeal from a decision of the District Manager, Dickinson, North Dakota, District Office, Bureau of Land Management, determining flared gas was avoidably lost and requiring compensation to the lessor. M-32329 (ND) Acq.

Set aside and remanded.

1. Oil and Gas Leases: Generally--Oil and Gas Leases: Royalties

An NTL-4A requiring compensation for the venting or flaring of natural gas in the absence of authorization was promulgated in the exercise of the Department's statutory and regulatory authority to require lessees to market oil and gas produced from the lease if economically feasible. A decision of BLM conclusively presuming that gas flared without prior authorization was avoidably lost, and, hence, that compensation was due to the lessor, will be set aside and the case remanded to determine whether in fact it was economically feasible to market the gas at the time it was flared where BLM has since changed its interpretation of NTL-4A to give the lessee notice and an opportunity to show the gas was not marketable at the time and where it appears this interpretation is consistent with the intent of the underlying statutory and regulatory authority.

Lomax Exploration Co., 105 IBLA 1 (1988), modified.

APPEARANCES: Marla J. Williams, Esq., and Thomas H. McCarthy, Esq., Denver, Colorado, for Ladd Petroleum Corp.; Bonnie S. Mandell-Rice, Esq., Denver, Colorado, for Patrick Petroleum Corp. of Michigan; Roger W. Thomas, Esq., Office of the Field Solicitor, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Ladd Petroleum Corporation (Ladd) has appealed from a December 5, 1986, decision letter of the District Manager, Dickinson, North Dakota, District Office, Bureau of Land Management (BLM), requiring payment of compensation

for natural gas flared without prior authorization on the Harris-Federal No. 1-30 well, lease No. M-32329 (ND) Acq. On August 29, 1988, the Board granted a motion by Patrick Petroleum Corporation of Michigan (Patrick) to intervene as a party appellant based on Patrick's assertion that it was the operator of the well at issue during most of the time period when liability is asserted for the flared gas and, hence, is potentially liable.

Oil and gas lease M-32329 (ND) Acq. was issued with an effective date of November 1, 1975. The Harris-Federal No. 1-30 well was completed as a producing oil well on June 19, 1981, by Patrick who was the lease operator at that time. 1/ Patrick filed monthly reports of lease operations with BLM beginning in August 1981. In these reports, Patrick indicated the number of barrels of oil produced and sold and the volume of the gas produced. The latter figure was further broken down into the volume used on the lease and the volume flared or vented. No gas was sold from the lease.

Subsequent to a sale of its interest consummated in August 1984, Patrick executed a request for approval of assignment of its interest in 8.33 percent of the operating rights to Ladd on November 5, 1984. BLM approved the assignment effective January 1, 1985. By subsequent assignment approved effective August 1, 1985, Patrick conveyed its remaining 16.67-per-cent interest in the operating rights to Ladd.

Shortly after acquiring its operating interest, Ladd discovered that Patrick had failed to obtain formal authorization from BLM to flare the gas produced from the well. On October 4, 1984, Ladd filed an application, requesting formal approval of the flaring of the gas. In support of its application, Ladd asserted that the gas produced with oil from the well could not be marketed because the small volume of gas reserves could not justify the cost of construction of a pipeline to transport the gas to market. Ladd further noted that, by order dated February 23, 1983, the North Dakota Industrial Commission had agreed that it was not economically feasible to produce the gas from the well and transport it to market. On October 31, 1984, BLM approved the continued flaring of gas from the well, effective as of that date.

On December 5, 1986, BLM issued the decision challenged here. In that decision, the District Manager stated that a review of the records for the lease revealed that gas was flared from "August 1, 1981, through October 31, 1984, without the prior authorization, approval, ratification, or acceptance of the Supervisor." The District Manager concluded, pursuant to Notice to Lessees (NTL)-4A, that gas flared without prior authorization is considered avoidably lost gas, and as such "[c]ompensation is due the United States Government as described by NTL-4A Part I." The decision further stated:

> Our records show 68,409 MCF gas was flared without authorization, and the compensation due the United States will be based as follows: (1) that portion flared prior to October 1, 1984, is

1/ The lease was issued for 2,318.88 acres in Billings County, North Dakota, to Lawrence C. Harris.

> subject to full value, and (2) that portion flared after September 30, 1984, is subject to royalty value. You will receive a formal billing with payment instructions from the Minerals Man-agement Service.

Ladd and Patrick raise several issues on appeal. They argue that BLM erroneously determined that the gas flared before October 31, 1984 was avoidably lost. In this regard, they challenge both the validity and applicability of NTL-4A. They further assert that capturing the gas from the oil well was not economically feasible, and that shutting in the well and/or reinjecting the gas were not prudent or economical alternatives to the flaring. Because it was uneconomic to capture the gas, appellants argue that the flared gas was unavoidably lost. Additionally, they note that BLM knew of the flaring from the monthly reports filed beginning in August 1981 and from onsite inspections, yet BLM never notified Patrick that the flaring was subject to prior approval. Appellants also contend that, even if the United States were entitled to

compensation for the flared gas, the amount of compensation should be limited to royalty payments, and not the full value of the gas flared prior to October 1, 1984. Further, appellants assert that, in any event, they are not responsible for payment of any compensation which is attributable to lease interests held by other parties.

Ladd further argues that it is not liable for violations of NTL-4A committed by another operator before Ladd obtained its interest in the lease and assignment of that interest was approved by BLM. Ladd asserts that it had no contractual, statutory, or regulatory obligations of any kind to the United States until it acquired an interest in the lease and assumed operations, and that then its obligations were limited to the extent of its operating rights interest of 8.33 percent. Ladd contends that at most it should be liable only for compensation assessed for its limited share of the gas flared.

[1] This Board has previously had occasion to uphold NTL-4A as a proper exercise of the Department's authority pursuant to the regulations at 43 CFR 3162.7-1 to require the lessee to market oil and gas produced from the lease if economically feasible and to conduct operations in such a manner as to prevent avoidable loss of oil and gas. Lomax Exploration Co., 105 IBLA 1 (1988). In that case the Board affirmed a finding that gas vented from certain wells prior to receipt of approval for such venting was avoidably lost thus resulting in liability for royalties on the flared gas. Id. Application of this precedent alone would require us to affirm the BLM decision to the extent it held that gas vented prior to the October 1984 approval was avoidably lost, although this would not establish the liability of appellant Ladd prior to the time it acquired an operating interest in the lease. However, we note that since the filing of this appeal, BLM has altered its absolute requirement for prior approval of flaring under NTL-4A.

On August 17, 1987, while this case was pending on appeal, the Director of BLM issued Instruction Memorandum (I.M.) No. 87-652 concerning BLM's policy for avoidably lost gas on onshore Federal and Indian oil and gas leases. I.M. No. 87-652, which applies to both past and future determinations of avoidably lost gas, requires that, when no application to flare gas

has been submitted by an operator after the expiration date of the initial authorized test period (30 days or 50 MMcf, whichever occurs first), BLM must notify the operator that it has 60 days in which to submit an application to justify its position that it was uneconomic to capture gas both at the time of application and as of the expiration date of the initial authorized test period. Id. at 5.

The rationale for allowing an operator to demonstrate later that it was uneconomic to capture the gas from the time that unauthorized venting commenced is stated as follows:

> [I]f, in fact, it was not economic to do so at that time, no mone-tary obligation should attach solely by reason of a failure to have filed a timely application to continue venting or flaring. In most, if not all cases of unauthorized venting or flaring, operators have reported and continue to report monthly the volumes of gas being vented or flared. In many instances, however, no action was taken to compel compliance with applicable requirements until months or even years after the onset of the unauthorized venting or flaring. Thus, when it would have been uneconomic to capture the gas as of the critical point in time, the balance weighs on the Bureau's failure to react timely to the monthly reports, rather than on the operator's failure to seek a timely approval to continue venting or flaring as uneconomic, since no economic loss has been suffered. The balance weighs on the operator's failure, however, when it would have been economic to capture the gas at the critical time.

I.M. No. 87-652 at 8. The I.M. further requires BLM to review all prior determinations of avoidable loss that meet the criteria set out and to take appropriate action to conform those determinations to the guidance set out in the I.M. Id. at 6.

Although these guidelines were not in effect when BLM issued the deci-sion in the instant case, they reflect the present policy of BLM concerning the proper application of NTL-4A and the regulations on which it is based to make determinations of avoidably lost gas. In the past, this Board has applied an amended version of a regulation to a pending matter if to do so would benefit the affected party, and if there were no countervailing public policy reasons or intervening rights. James E. Strong, 45 IBLA 386 (1980). The rationale for such action is equally appropriate here where BLM has indicated a change in its policy regarding the application of NTL-4A concerning avoidably lost gas which would benefit appellants, and there are no countervailing regulations, public policy considerations, or intervening rights. See Somont Oil Co., Inc., 91 IBLA 137 (1986). We note that this case falls squarely within the rationale for the change in policy: Patrick reported the volume of the gas flared each month for over 3 years without BLM taking action to compel compliance with the applicable requirements. Accordingly, we set aside BLM's determination that gas flared from the well prior to October 31, 1984, was avoidably lost, and remand for further con-sideration of whether it was uneconomic to capture that gas at that time, consistent with the guidelines announced in I.M. No. 87-652. Our holding

in Lomax Exploration Co., supra, is modified to allow the lessee an oppor-tunity to show the gas vented or flared without prior authorization was not economically recoverable in accordance with the Department's amended interpretation of NTL-4A.

In light of our resolution of this appeal, we find it unnecessary to rule on the other issues raised by appellants.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge